FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 5 1965
JOHN F. DAVIS, CLERK

No. 705

In the Supreme Court of the United States

OCTOBER TERM, 1964

SAM GIANCANA

v.

MARLIN W. JOHNSON, AGENT IN CHARGE, CHICAGO OFFICE OF THE FEDERAL BUREAU OF INVESTIGATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 705

SAM GIANCANA

v.

MARLIN W. JOHNSON, AGENT IN CHARGE, CHICAGO OFFICE OF THE FEDERAL BUREAU OF INVESTIGATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–12) is reported at 335 F. 2d 366.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1964. On September 28, 1964, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 20, 1964, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

758-568—65

QUESTION PRESENTED

Whether petitioner's complaint and the record made at a hearing provided a basis for federal district court jurisdiction.

STATUTE INVOLVED

Title 28, United States Code, provides in pertinent part:

Section 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT

On June 27, 1963, in the United States District Court for the Northern District of Illinois, petitioner filed a civil action against J. Edgar Hoover, Director of the Federal Bureau of Investigation, and Marlin W. Johnson, the agent in charge of the Bureau's Chicago office, alleging that his Fourth and Fifth Amendment rights were being infringed by an F.B.I. surveillance of his home and activities. Petitioner prayed for preliminary and permanent injunctions, but did not ask for money damages (App. 8–18).[1]

[1] "App." refers to the government's appendix, "Supp. App." to the government's supplemental appendix, and "Br. App." to petitioner's brief in the court below. We have lodged the supplemental appendix and petitioner's brief with the Clerk of this Court.

His complaint, which alleged jurisdiction under 28 U.S.C. 1331 and "the 4th and 5th Amendments to the Constitution," did not allege that the matter in controversy exceeded the value of $10,000 (App. 8).

On the following day the parties appeared at a hearing in the district court on petitioner's motion for a temporary restraining order and on the government's motion to dismiss the complaint for the reason, *inter alia*, that the court lacked jurisdiction over the subject matter (App. 31, 32–34, 36–117). At the hearing the government contended that the court had no jurisdiction under Section 1331 because it was not alleged that $10,000 was in controversy. Petitioner's counsel stated that the action was brought under Section 1331, but that the Section's jurisdictional amount requirement had no application to actions involving "fundamental civil rights" (App. 89). Government counsel observed that another statutory provision, 28 U.S.C. 1343, which conferred jurisdiction on the district courts to entertain actions brought under federal civil rights statutes, did not contain a jurisdictional amount requirement. But the prosecutor noted that petitioner's action did not fall under any of those statutes (App. 89–93, 102–103). At the end of the hearing, the court continued the matter until July 12.

On July 11, the day before the second hearing, petitioner filed an amended complaint in which he deleted all reference to Section 1331 from the paragraph alleging jurisdiction, leaving only his citation of the Fourth and Fifth Amendments. The caption of the

complaint was amended, however, to read, "28 U.S.C.A., Section 1331 and 1343(4), Amend. 4 and Amend. 5, Constitution of the United States" (App. 19). As in his original complaint, petitioner did not allege the amount in controversy.

Further hearings were held on July 12, 15 and 16 (App. 117–293). Throughout, the government contended that the district court was without power to entertain the action if petitioner refused to allege the required jurisdictional amount. Twice during the hearing on July 12, the government called to petitioner's attention, as well as to the attention of the court, that the jurisdictional defect would be cured if petitioner were to amend his complaint to allege that the amount in controversy exceeded $10,000 (App. 130, 146). Petitioner, however, took no steps to amend. Instead, he argued that "there is no need for jurisdictional amount because it is basically a civil rights question and no particular amount need be alleged;" that district judges have "inherent power," irrespective of jurisdictional statutes, to enjoin violations of the constitution; and that, in any event, jurisdiction rested upon Section 1343(4) (App. 130–132, 139, 142–144). At the hearing of July 15, petitioner introduced testimony of witnesses in support of the factual allegations in his complaint. The government, maintaining that the court lacked jurisdiction, did not cross-examine these witnesses or offer any evidence.

Ruling on the government's motions, the district

court dismissed the complaint as to defendant Hoover, for lack of jurisdiction over his person, but refused to dismiss as to defendant Johnson (App. 284). On July 24, 1963, the court, after concluding that it had jurisdiction under the Fourth and Fifth Amendments, issued a preliminary injunction restraining defendant Johnson from (1) "maintaining more than one car within one block" of petitioner's home; (2) "having more than one car at any time following" petitioner; and (3) having less than "one foursome intervene" between F.B.I. agents and petitioner on the golf course (App. 53, 67).

The order was stayed pending appeal (App. 306; Supp. App. 8–9). The court of appeals, with one judge dissenting, reversed the district court and held that the district court lacked jurisdiction because of petitioner's failure to allege and to show that the jurisdictional amount was in controversy and because no other federal jurisdictional statute was applicable (Pet. App. 1–12; 335 F. 2d 366). It remanded the case for further proceedings.

ARGUMENT

In its present posture this case involves only a limited jurisdictional issue on which, we submit, the court of appeals ruled correctly. As a basis for the district court's jurisdiction, petitioner invoked 28 U.S.C. 1331 and 28 U.S.C. 1343(4). Federal jurisdiction under the former provision depends on a showing that "the matter in controversy exceeds the sum or value of $10,000," and this requirement is applicable even if only injunctive relief is sought and

even if the complaint alleges an infringement of the plaintiff's constitutional rights. *E.g., Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 508; *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178. Jurisdiction under Section 1343(4) depends on whether the claim is for relief "under any Act of Congress providing for the protection of civil rights, including the right to vote." Petitioner failed to meet the requirements of either statute since his complaint did not allege that $10,000 was in controversy nor did it invoke any civil right for which Congress has, by statute, granted a civil remedy.[2] Accordingly, the court of appeals properly concluded that the complaint, as amended, failed to allege any basis for federal jurisdiction. See Rule 8(a), Federal Rules of Civil Procedure.

There is no merit to petitioner's contention (Pet. 13–14) that the record of the hearing establishes that the matter in controversy exceeded $10,000. Since the government made a timely challenge to petitioner's failure to allege the jurisdictional amount, he had the

---

[2] No relevant federal statutes are cited in the complaint or in the petition for certiorari. Petitioner's brief in the court of appeals apparently referred to 42 U.S.C. 1985, which grants a civil remedy to anyone who is deprived of "the equal protection of the laws, or of equal privileges and immunities under the laws" by "two or more persons in any State or Territory [who] conspire or go in disguise on the highway or on the premises of another * * *." See Pet. App. 7a, n. 9. The present claim does not come within that statute. See *Collins* v. *Hardyman*, 341 U.S. 651; *Egan* v. *City of Aurora*, 291 F. 2d 706 (C.A. 7). Nor would 18 U.S.C. 242, which provides criminal penalties for deprivations of constitutional rights under color of any law, constitute a permissible basis for an assertion of jurisdiction since that statute prescribes criminal penalties only.

burden of remedying the pleading defect and of showing, by a preponderance of the evidence, that the required amount was at issue. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178. This petitioner did not do; instead, he clung steadfastly to his original position that he was not required to plead and to prove the $10,000 amount (see p. 4, *supra*). Not until he reached the court of appeals did he contend that the amount could be inferred from the record (Br. App. 16–18). Consequently, the district court, which found jurisdiction under the Fourth and Fifth Amendments rather than under Section 1331 (App. 67), never made any finding as to monetary value, leaving the record bare of an adequate jurisdictional finding. The record, having been framed under a different theory, is silent about the extent of petitioner's injuries and the value to be attached to his rights. The record contains allegations and testimony concerning the manner in which the surveillance was conducted, but it contains no evidence as to how the surveillance affected petitioner, his family, or his business. Since the court below had no power to speculate about the value of petitioner's rights, it had no choice except to dismiss the action for lack of jurisdiction. *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496; *KVOS, Inc.* v. *Associated Press*, 299 U.S. 269; *McNutt* v. *General Motors Acceptance Corp.*, *supra*.[3]

[3] In *Hague*, involving an injunction against city officials to protect First Amendment rights, this Court held that jurisdiction did not lie under Section 1331 (then 28 U.S.C. 41(1)) because, although replete with evidence of the officials' conduct, the record was "bare of any showing of the value of the asserted

Moreover, the judgment of the court of appeals remanding the case to the district court for further proceedings apparently allows petitioner to move to amend his complaint upon remand in order to make the necessary allegation.[4] In these circumstances, even the narrow jurisdictional question which might be presented if leave to amend were denied or if a constitutional claim valued at less than $10,000 were asserted is not presented by this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JANUARY 1965.

---

rights to the respondents individually * * *." 307 U.S. at 508. This holding refutes any suggestion that constitutional rights are not subject to the $10,000 requirement of Section 1331. See also *McNutt* v. *General Motors Acceptance Corp.*, *supra* (injunction to protect Fourteenth Amendment rights). Compare *Bell* v. *Hood*, 327 U.S. 678 (where the $10,000 amount was pleaded and this Court took jurisdiction over damage suit against F.B.I. agents for violation of Fourth Amendment). Although the *Hague* majority divided over the construction of Section 1343, they were unanimous in rejecting jurisdiction under Section 1331.

[4] Petitioner has given no indication whatever that he would be unable to claim in good faith that the rights of which he was allegedly deprived exceeded the "value of $10,000."

U.S. GOVERNMENT PRINTING OFFICE: 1965